# Bayer (M) Sdn Bhd v Ng Hong Pau

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–04–28 OF 1998
SHAIK DAUD, NH CHAN AND SITI NORMA YAAKOB JJCA
8 SEPTEMBER 1999

***Labour Law*** *— Employment — Redundancy — Grounds for redundancy — Whether proved*

The respondent was an employee of the appellant since 1 June 1980. On 17 September 1990, the appellant informed the respondent that his employment was terminated on the reasons that: (i) the appellant expected to suffer operational loss in excess of over RM1m for 1990; and (ii) the respondent's position with the appellant was redundant. The respondent subsequently made representations to the Director General of Industrial Relations and the case proceed to the Industrial Court. The court found that on the evidence of witnesses, the respondent's dismissal was without just cause or excuse and awarded the respondent arrears of salary and compensation in lieu of reinstatement. The High Court dismissed the appeal. The appellant appealed.

**Held**, dismissing the appeal with costs:

(1) The appellant must adduce evidence to show that the grounds of termination existed before the Industrial Court. The first reason fell flat when the evidence showed that in 1990 the appellant paid numerous increments and had made a profit of RM1.5m. Further, it was also confirmed that the respondent was dismissed not because his work ceased to exist (see p 364F–H).

(2) The burden is on the appellant to prove actual redundancy on which the dismissal was grounded. To show evidence of a re-organization in the appellant is insufficient. There was evidence before the court that although sales were reduced, the workload of the respondent remained the same. After his dismissal, his workload was taken over by his former colleagues. Therefore, there was no convincing evidence produced by the appellant that the respondent's functions were reduced to such an extent that he was considered redundant (see pp 364I–365B).

[**Bahasa Malaysia summary**

Responden adalah pekerja perayu sejak 1 Jun 1980. Pada 17 September 1990, perayu telah memberitahu responden bahawa pekerjaannya ditamatkan atas alasan-alasan bahawa: (i) perayu dijangka akan mengalami kerugian operasi melebihi RM1 juta pada tahun 1990; dan (ii) kedudukan responden dengan perayu adalah tidak diperlukan. Kemudian responden telah membuat representasi kepada Pengarah Perhubungan Awam dan kes telah dimulakan di Mahkamah Perusahaan. Mahkamah mendapati berdasarkan

keterangan saksi-saksi, pemecatan responden adalah tanpa sebab dan alasan yang saksama dan telah mengawardkan tunggakan gaji dan juga pampasan sebagai menggantikan pengembalian jawatan. Mahkamah Tinggi telah menolak rayuan tersebut dan perayu telah merayu.

**Diputuskan,** menolak rayuan dengan kos:

(1) Perayu mestilah mengemukakan keterangan untuk menunjukkan bahawa alasan untuk penamatan telah wujud di hadapan Mahkamah Perusahaan. Alasan pertama gagal kerana keterangan menunjukkan bahawa pada tahun 1990 perayu telah sering membayar kenaikan gaji dan telah mendapat keuntungan sebanyak RM1.5 juta. Selanjutnya, adalah juga disahkan bahawa responden telah dipecat bukan kerana kerjanya tidak wujud lagi (lihat ms 364F–H).

(2) Beban adalah terletak di atas perayu untuk membuktikan keadaan tidak diperlukan kerja di mana pemecatan itu didasarkan. Dengan menunjukkan keterangan penyusunan organisasi di pihak perayu adalah tidak mencukupi. Terdapat keterangan di hadapan mahkamah bahawa walaupun jualan telah berkurangan, jumlah kerja responden adalah sama. Selepas pemecatannya. kerjanya dilakukaan oleh bekas rakan sekerjanya. Oleh itu, tidak terdapat keterangan menyakinkan yang dikemukakan oleh perayu bahawa peranan responden telah dikurangkan sehingga ke tahap di mana beliau dianggap tidak diperlukan bekerja lagi (lihat ms 364I–365B).]

**Notes**

For a cases redundancy, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) para 823.

**Cases referred to**

*Chapman & Ors v Goonvean & Rostowrack China Clay Co Ltd* [1973] 2 All ER 1063 (refd)

*Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129 (refd)

**Legislation referred to**

Industrial Relations Act 1967 s 20(1), (3)

**Appeal from:** Originating Motion No R2–25–142 of 1997 (High Court, Kuala Lumpur)

*TM Varughese* (*TM Varughese & Co*) for the appellant.

*P Kuppusamy* (*P Thavaselvi* with him) (*Kuppusamy & Co*) for the respondent.

**Shaik Daud JCA (delivering judgment of the court):** This is an appeal from the decision of the High Court which had on 18 May 1998, dismissed

A the appellant's application for certiorari to quash the award of the Industrial Court handed down on 30 September 1997.

The facts of the case are that the respondent commenced employment on 1 June 1980 with the appellant as Operations Manager of the Operations Department of the Crop Protection Division which was originally known as
B the Agro Chemical Division. He had four subordinates under him, namely Assistant Manager, Assistant Executive and two general clerks.

On 1 January 1988, the appellant decided to split the Operations Department into two, one was called Production Department and the other Logistic and Sales Administration Department. The respondent's former assistant manager, one Loh Chee Kong, was appointed as the manager of
C the Production Department and the respondent was apponted the Logistic and Sales Administrative Manager.

Everything appeared to be going on smoothly thereafter until 17 September 1990, the appellant wrote to the respondent informing him that his employment was terminated with effect from the date of the letter
D giving two reasons: (1) that the appellant expected to suffer operational loss in excess of over RM1m for 1990; and (2) that the respondent's position with the appellant was redundant.

Naturally, the respondent was not happy with this move and he made representations to the Director General of Industrial Relations ('DGIR') that he had been dismissed without just cause or excuse and sought
E reinstatement. The representations were made pursuant to s 20(1) of the Industrial Relations Act 1967 ('the Act').

The DGIR having failed to affect a settlement, reported the matter to the Minister of Human Resources who in turn referred it to the Industrial Court for an enquiry pursuant to s 20(3) of the Act.

F After a full enquiry, the Industrial Court found that on the evidence of witnesses, the respondent's dismissal was without just cause or excuse and in lieu of re-instatement, the court awarded the respondent as follows:

(a) Arrears of salary of RM5,350 per month from 17 September 1990 to the last day of the hearing on the case, ie 23 December 1996 together
G with the 13th month salary for the year 1990 to 1996, less two months salary in lieu of notice which was paid subject to EPF deductions;

(b) 16 months salary at RM5,350 per month as compensation in lieu of reinstatement being one month salary every year of completed service.

It was the finding of the Industrial Court that the appellant 'failed to make
H out a case to justify the dismissal of the respondent'. The court found on the materials before it that the claim by the appellant that the post held by the respondent was redundant was not convincing as the court found as a fact that the workload of the respondent remained almost the same even though the turnover of the sale was reduced, and even after the respondent was
I dismissed, the job previously carried out by the respondent were shared by three other staff.

Another reason given was that the appellant did not adhere to the guidelines in the Code of Conduct for Industrial Harmony in that the

appellant failed to show any convincing evidence that it tried its best to find some other jobs for the respondent within the company. A

After reviewing the award of the Industrial Court, the High Court was of the view that the Industrial Court had made a proper evaluation of all the evidence before it and therefore the High Court was of the view that the Industrial Court's conclusion that the dismissal of the respondent was without just cause or excuse, was proper. The High Court found no reason to interfere with the award and dismissed the appellant's application with costs. B

It is our view that although the High Court is not acting in its appellate capacity in reviewing awards of the Industrial Court, it nevertheless should not interfere in the Industrial Court's findings of facts. In this case, the Industrial Court after hearing evidence from witnesses, came to a finding of fact on the alleged reasons for the dismissal by the appellant. The appellant in their letter of 17 September 1990 dismissing the respondent, gave two reasons for the dismissal. It is therefore encumbent on the Industrial Court to determine whether the appellant had shown by evidence that these two reasons exist to justify the dismissal. In *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129, the Federal Court at p 136 held: C D

> Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it *finds as a fact* that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High court cannot go into another reason not relied on by the employer or *find one for it.* (Emphasis added.) E F

As mentioned earlier, the appellant gave two reasons for the dismissal, ie that they '*expected* to suffer operational loss in excess of RM1m for 1990 and the respondent's position was found to be redundant'. It is therefore, encumbent upon the appellant to adduce evidence to show both the above reasons existed before the Industrial Court. G

The first reason fell flat when the evidence showed that in 1990 the appellant paid non-contractual salary increments amounting to RM328,237.70 for that year, increased the Director's emolument by RM36,000, declared a dividend of RM129,350 and the appellant made a profit of RM1.5m. Mr Knut Rolf Herzer, the Managing Director, also confirmed that the appellant paid bonuses for 1990. He also confirmed and thereby contradicted his earlier evidence, that the respondent was dismissed because his work ceased to exist and that it had nothing to do with the expected loss. H

On redundancy, it cannot be gainsaid that the appellant must come to the court with concrete proof. The burden is on the appellant to prove actual redundancy on which the dismissal was grounded (see *Chapman & Ors v Goonvean & Rostowrack China Clay Co Ltd* [1973] 2 All ER 1063). I

A It is our view that merely to show evidence of a re-organization in the appellant is certainly not sufficient. There was evidence before the court that although sales were reduced, the workload of the respondent remained the same. After his dismissal, his workload was taken over by two of his former colleagues. Faced with these evidence, is it any wonder that the court made a finding of fact that there was no convincing evidence
B produced by the appellant that the respondent's functions were reduced to such an extent that he was considered redundant.

On the totality of the evidence, we are satisfied that the learned judge was right in not interfering with the award of the Industrial Court. We dismissed the appeal with costs and ordered the deposit to go to account of
C the respondent's taxed costs.

*Appeal dismissed with costs.*

Reported by Loo Lai Mee

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